

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LA JOLLA COVE SHOPS, LLC,

Plaintiff and Respondent,

v.

AIMCO PROPERTIES, L.P., et al.,

Defendants and Appellants.

D069038

(Super. Ct. No.  
37-2014-0035095-CU-BC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Richard E. L. Strauss, Judge. Affirmed.

Allen Matkins Leck Gamble Mallory & Natsis, Valentine S. Hoy, Timothy M. Hutter; Dentons US and Charles A. Bird for Defendants and Appellants.

Vantage Law Group and Michael H. Riney for Plaintiff and Respondent.

I.

INTRODUCTION

Defendants Aimco Properties, L.P. (Aimco), Neil Heimburge, Erik Heimburge, and Sandra Squires (the Heimburgs and, together with Aimco, Defendants) appeal an

order denying their motion under the anti-SLAPP<sup>1</sup> provisions of Code of Civil Procedure section 425.16<sup>2</sup> to strike all, or portions of, the second amended complaint (SAC) filed against them by plaintiff La Jolla Cove Shops, LLC (Shops). They contend that the trial court erred in denying their motion because certain conduct alleged in support of Shops's claims is activity protected under section 425.16.

In order for a defendant to prevail on an anti-SLAPP motion, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) If the defendant makes the required showing, the plaintiff then must demonstrate the merit of the claim by establishing a probability of success. (*Id.* at p. 714.) During the pendency of this appeal, the California Supreme Court issued a decision in *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*), disapproving a line of cases concerning the showing required of a plaintiff at the second step of the anti-SLAPP analysis in cases in which the factual allegations supporting a pleaded cause of action include both protected and unprotected activity. *Baral* also clarified the "showings and findings" required at both steps of the anti-SLAPP procedure. (*Baral*, 1 Cal.5th at p. 396.) We requested that the parties file supplemental briefs addressing the impact, if any, of the *Baral* decision on this case.

We conclude that Defendants did not carry their initial burden at the first step of the anti-SLAPP analysis to show that any of Shops's claims for relief arose from

---

<sup>1</sup> "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

<sup>2</sup> All statutory references are to the Code of Civil Procedure.

Defendants' protected activity. Rather, Defendants' protected conduct alleged in the SAC was incidental or collateral to, and merely provided context for, Shops's claims for relief.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>3</sup>

#### A. *Facts*

In 2014, the Baroudis (Krista Baroudi and her son Marco) and the Heimbürges each owned 50 percent of La Jolla Cove Motel and Hotel Apartments, Inc. (LJCM), and Universal Boot Shops, a general partnership (UBS). LJCM and UBS owned certain real property in La Jolla located on Coast Boulevard and on Prospect Street.<sup>4</sup> The LJCM bylaws and UBS partnership agreement contained right-of-first-refusal (ROFR) provisions, requiring that before the Baroudis or the Heimbürges could transfer any ownership interest in LJCM or UBS to a third party, they must first give written notice to that entity (LJCM or UBS) and to the other part-owners of the terms and conditions of the proposed transfer. That entity would then have 60 days after the notice to exercise its primary ROFR rights to purchase the selling owner's interest on the same terms and conditions, and, if it did not timely exercise its rights, the other part-owners of that entity would then have 30 days to exercise their secondary ROFR rights to purchase the selling owner's interest, on the same terms and conditions as the proposed transfer.

---

<sup>3</sup> The statements of facts in our opinion are based on allegations in the SAC and evidence submitted in support of, and in opposition to, Defendants' anti-SLAPP motion.

<sup>4</sup> The Baroudis and the Heimbürges inherited their ownership interests from a common grandfather.

In June 2014, the Heimbürges accepted an offer from PRES Real Estate Investments, LLC (PRES) to purchase their 50 percent interests in LJCM and UBS for approximately \$26 million in cash and provided notice of the offer to LJCM, UBS, and the Baroudis, pursuant to their ROFR rights. In July, PRES assigned to Aimco its rights to purchase the Heimbürges' interests in LJCM and UBS.

In August, after the primary ROFR rights of LJCM and UBS had expired and the Baroudis' secondary ROFR rights were triggered, the Baroudis accepted a letter of intent pursuant to which La Jolla Cove Suites, LLC (Suites) would purchase all of the stock of LJCM and assets of UBS for \$60 million. The Baroudis received a \$1 million deposit from Suites. On that day, the Baroudis exercised their ROFR rights to purchase the Heimbürges' 50 percent interests in LJCM and UBS on the same terms as set forth in the PRES offer, and paid a \$1 million deposit into escrow. Suites subsequently assigned its rights under the letter of intent to Shops. After learning of that letter of intent, Aimco took action to prevent the sale of the real property owned by LJCM and UBS to Shops and, instead, to secure that property for itself.

On September 16, Aimco and the Heimbürges entered into a contribution agreement (Contribution Agreement), pursuant to which Aimco agreed to purchase the Heimbürges' interests in LJCM and UBS and apparently offered the Heimbürges the option to avoid or defer taxes on the transaction by accepting as purchase consideration operating partnership units in an umbrella partnership real estate investment trust. The Contribution Agreement stated, *inter alia*, that: "If Krista Baroudi subsequently refuses or

fails to close the transactions contemplated by her purported exercise of each ROFR on or before September 30, 2014, such ROFR shall be deemed to have been waived."

Just before the scheduled close of escrow for the Baroudis' exercise of their ROFR, Aimco filed a lawsuit against the Heimburgs and the Baroudis seeking equitable relief to prevent that closing.<sup>5</sup> Aimco's request for a temporary restraining order (TRO) was denied. On the day the escrow was scheduled to close, Aimco's attorney sent a letter to Chicago Title Company (CTC), the escrow holder for the ROFR closing, stating Aimco's intent to conduct discovery in its lawsuit regarding the Baroudis' potential sale of LJCM and UBS to Shops and threatening to seek the unwinding of any transfer of interests if the Baroudis acted in derogation of their duties.

That same day, Shops and the Baroudis executed a formal purchase agreement. However, shortly thereafter, CTC notified them that pending litigation prevented it from proceeding with the closing of the Baroudis' ROFR rights and sale of their interests in LJCM and UBS to Shops. Nevertheless, Shops deposited the entire \$60 million purchase price into the escrow account and requested that the Baroudis and the Heimburgs complete the ROFR closing that day. In fact, the closing did not occur on that day, nor did it occur thereafter.

Aimco purchased the Heimburgs' and the Baroudis' interests in LJCM and UBS before the end of 2014.

---

<sup>5</sup> Pursuant to the agreement between Shops and the Baroudis discussed below, that closing could have been delayed for up to three months due to "Heimburg resistance."

## *B. Procedure*

While the Aimco purchase was pending, Shops filed the instant action. Its SAC named Aimco, the Heimbürges, LJCM, UBS, and others as defendants and alleged nine causes of action: (1) intentional interference with contract; (2) intentional interference with prospective economic relations; (3) negligent interference with prospective economic relations; (4) unfair business practices (UBP); (5) declaratory relief that the Baroudis had properly exercised their ROFR rights; (6) declaratory relief that Aimco's assignment was invalid; (7) declaratory relief that the amended offer was invalid; (8) declaratory relief that the Contribution Agreement was invalid; and (9) declaratory relief that the sale transactions between Aimco and the Heimbürges and Aimco and the Baroudis were invalid and should be unwound.

Defendants filed a section 425.16 motion to strike the entire SAC or, in the alternative, all allegations related to the filing of Aimco's complaint and its attorney's letter to CTC. The trial court denied the motion, concluding that Defendants had not carried their burden to show that Shops's claims arose from protected acts (i.e., Aimco's complaint and its attorney's letter) and stating that those acts were only two of many that allegedly interfered with Shops's contractual and other rights related to the purchase of the real property at issue. The court further concluded that, even if those two acts constituted the gravamen of Shops's claims, Shops had nevertheless carried its burden to establish a *prima facie* case that Defendants interfered with its rights by presenting evidence of the Contribution Agreement and Aimco's ultimate purchases of the Heimbürges' and the Baroudis' interests.

### C. *Appeal*

Defendants timely filed a notice of appeal, challenging the trial court's order denying their section 425.16 motion. On August 1, 2016, after the parties had filed their briefs in this appeal, the California Supreme Court issued its opinion in *Baral*. (*Baral*, *supra*, 1 Cal.5th 376.) We requested, received, and have considered the parties' supplemental letter briefs addressing the application of *Baral* to this appeal.

## III.

### DISCUSSION

#### A. *Anti-SLAPP motions generally*

A SLAPP "is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. ' "While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right." ' [Citations.]" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) Section 425.16, the anti-SLAPP statute, "was enacted in 1992 for the purpose of providing an efficient procedural mechanism to obtain an early and inexpensive dismissal of nonmeritorious claims 'arising from any act' of the defendant 'in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . .' (§ 425.16, subd. (b)(1).)" (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186.)

Section 425.16, subdivision (b)(1), provides:

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

As described in the introduction, a court engages in a two-step process in deciding an anti-SLAPP motion. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).)

Under the first step, the defendant has the initial burden to show that the claims arose from his or her protected activity. (*Equilon, supra*, 29 Cal.4th at p. 67.) In deciding whether the defendant has met that burden, a court considers "whether the plaintiff's cause of action itself was *based on an act in furtherance of* the defendant's right



of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, some italics added.) The court's focus is not the form of the cause of action or claim, "but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Navellier*, at p. 92.)

On appeal from an order denying an anti-SLAPP motion, "[w]e independently review the record to determine whether the asserted causes of action arise from the defendant's free speech or petitioning activity, and, if so, whether the plaintiff has shown a probability of prevailing. [Citations.] We consider 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' [Citations.] We do not reweigh the evidence, but accept as true all evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law. [Citations.] If the trial court's decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion. [Citation.]" (*City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1306-1307.)

#### B. *Baral*

Prior to the California Supreme Court's recent decision in *Baral*, there was uncertainty regarding how the anti-SLAPP statute applied at the second step of the anti-SLAPP analysis when a cause of action alleged both protected and unprotected conduct (i.e., a "mixed cause of action"). (*Baral, supra*, 1 Cal.5th at pp. 381-382.) Some courts "held that [an anti-SLAPP] motion lies *only* to strike an entire count as pleaded in the

complaint." (*Id.* at p. 382.) One court so holding was *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, which stated: "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Mann*, at p. 106.) By so holding, *Mann* presumed that an anti-SLAPP motion must defeat an entire cause of action as pleaded in a complaint. (*Baral*, at p. 385.) However, other courts had concluded that allegations of protected conduct could be stricken from a mixed cause of action without affecting the allegations of unprotected conduct. (*Baral*, at p. 387, citing *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 772-774.)

In *Baral*, the California Supreme Court clarified the applicability of the anti-SLAPP statute to mixed causes of action and disapproved the *Mann* line of cases. (*Baral*, *supra*, 1 Cal.5th at pp. 392-396.) *Baral* stated: "[A]n anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded. [Citations.]" (*Id.* at p. 393.) Accordingly, "courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Ibid.*) Construing the anti-SLAPP statute's use of the term "cause of action" to mean a claim arising from protected activity, *Baral* stated:

"When the Legislature declared that a 'cause of action' arising from activity furthering the rights of petition or free speech may be stricken unless the plaintiff establishes a probability of prevailing, it had in mind *allegations of protected activity that are asserted as grounds for relief*. The targeted claim must amount to a 'cause of

action' in the sense that it is alleged to justify a remedy. By referring to a 'cause of action against a person arising from *any act* of that person in furtherance of' the protected rights of petition and speech, the Legislature indicated that *particular* alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion. (§ 425.16, subd. (b)(1), italics added.) Thus, in cases involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." (*Baral, supra*, 1 Cal.5th at p. 395.)

"To avoid confusion, [*Baral* referred] to the proper subject of a special motion to strike as a 'claim,' a term that also appears in section 425.16[, subd.](b)(1)." (*Baral, supra*, 1 Cal.5th at p. 382.)<sup>6</sup>

The court also clarified, however, that "[a]ssertions [involving protected conduct] that are 'merely incidental' or 'collateral' are not subject to section 425.16." (*Baral, supra*, 1 Cal.5th at p. 394.) In discussing protected acts that are incidental to the plaintiff's claims for relief, *Baral* cited *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, in

---

<sup>6</sup> Accordingly, the first step of the anti-SLAPP procedure requires that the defendant identify each allegation of protected conduct and that the court determine whether any claim for relief arises out of that protected conduct, not whether an entire "cause of action," as labeled in a pleading, arises out of that protected conduct. If a defendant makes the required showing at the first step, the plaintiff then has the burden to demonstrate a probability of prevailing on any claim for relief that is based on protected conduct. *Baral* states: "If the court determines that relief is sought based on allegations arising from activity protected by the statute [i.e., section 425.16], the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral, supra*, 1 Cal.5th at p. 396.)

which the court stated at page 1183: "For purposes of anti-SLAPP analysis, . . . an alleged act is incidental to a claim, and incidental to any unprotected activity on which the claim is based, only if the act is not alleged to be the basis for liability." (*Baral*, at p. 394.) *Wallace*, in turn, cited *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404 at pages 414 to 417, in which the court concluded that the defendant's advertising conduct was merely incidental to its manufacturing and sales conduct that was the basis for plaintiff's claims for relief. (*Wallace*, at p. 1183; see also *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [protected conduct that is merely incidental to unprotected conduct is not subject to anti-SLAPP statute]; *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399 [anti-SLAPP statute does not apply when defendant's alleged protected conduct is merely evidence supporting plaintiff's claims for relief and does not constitute the alleged wrongful conduct itself].) *Baral* further noted that "[a]llegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral, supra*, 1 Cal.5th at p. 394.)<sup>7</sup> Thus, at the first step of the anti-SLAPP analysis, a court determines whether a complaint's allegations of protected conduct are the basis for a claim for relief or, instead, are incidental or

---

<sup>7</sup> *Baral* also rejected the application of the primary right theory in determining a claim or cause of action that may be subject to an anti-SLAPP motion, stating: "Restricting anti-SLAPP motions to indivisible 'causes of action' as determined by primary right theory would be inconsistent with the Legislature's use of the term 'special motion to strike.' (§ 425.16, subd. (b)(1).)" (*Baral, supra*, 1 Cal.5th at pp. 394, 393-395.)

collateral to, or merely provide context for, a claim for relief based on unprotected conduct.

*C. Order denying Defendants' anti-SLAPP motion*

*1. The SAC, anti-SLAPP motion, and trial court's order*

As described above, the SAC alleged nine causes of action, including three interference claims, a UBP claim, and five requests for declaratory relief. In its general allegations, the SAC asserted certain conduct by Defendants, including the execution of the Contribution Agreement and Aimco's ultimate purchases of the Heimburgs' and the Baroudis' LJCM and UBS ownership interests, that allegedly wrongfully interfered with Shops's rights under its agreement with the Baroudis. On appeal, Defendants apparently concede that those actions are not activities protected by section 425.16 and, therefore, are not subject to an anti-SLAPP motion. The SAC also alleged in the general allegations that Aimco filed its September 2014 lawsuit and that its attorney then sent a letter to CTC on September 30. However, the SAC purported to exclude the filing of that lawsuit and the letter as grounds for its claims for relief, stating:

"62. The gravamen of [Shops's] claim is that Defendants wrongfully interfered with [the Baroudis'] ROFR, the [letter of intent], later assigned to [Shops], and with [Shops's] contract with [the Baroudis], to obtain a property worth in excess of \$60 million; [Shops's] *claim does not arise from Defendants' purportedly privileged conduct which, to the extent it exists, was merely incidental to Defendants' months-long campaign of interference*. Defendants' actionable misconduct culminated in Aimco's wrongful acquisition of the first 50% on October 31 (the Heimburgs' interest) and the second 50% on December 16 (the Baroudis' interest). As a result, Aimco now possesses the Property that rightfully belongs to [Shops]." (Italics added.)

The SAC proceeded to summarize "Defendants' acts of interference" in a chronological manner, omitting any reference to Aimco's lawsuit and its attorney's letter to CTC, while expressly describing certain other conduct, including: (1) Aimco's inducement of Richard Annen, the Heimbürges' and the Baroudis' broker and fiduciary, to secretly work for it in an effort to interrupt the Baroudis' ROFR rights and closing of Shops's purchase; (2) Aimco's actions to disrupt the relations of the Heimbürges and the Baroudis with the intent to prevent the closing of Shops's purchase; (3) the execution of the Contribution Agreement; (4) Aimco's ultimate purchases of the LJCM and UBS ownership interests from the Heimbürges and the Baroudis, which interfered with Shops's purchase agreement and prevented Shops from acquiring the property pursuant to that agreement; and (5) Aimco's taking possession of Shops's \$1 million deposit that rightfully belonged to Shops. The SAC's general allegations, described above, were then incorporated by reference into each of its nine specific causes of action. None of the nine causes of action referred to Aimco's lawsuit or its attorney's letter to CTC, or specifically alleged that those acts, or any delay in the closings of the escrows that may have been caused by those acts, were a basis for the relief requested.<sup>8</sup>

Defendants filed an anti-SLAPP motion seeking an order striking Shops's entire SAC or, in the alternative, all allegations and generalized references related to the filing

---

<sup>8</sup> For example, the SAC's first cause of action for intentional interference with contractual relations alleged that Defendants' interference with Shops's letter of intent and subsequent agreement to purchase the Baroudis' ownership interests and interference with the Baroudis' ROFR rights continued through their ultimate acts of interference, consisting of Aimco's purchase of the Heimbürges' and the Baroudis' LJCM and UBS ownership interests and its taking possession of Shops's \$1 million deposit.

of Aimco's lawsuit and its attorney's letter to CTC. Defendants argued that the entire SAC should be stricken because "the *only* alleged causative acts by Aimco are [its] protected litigation activity" on which Shops could not show a probability of prevailing without reference to those protected acts. Alternatively, Defendants argued that the trial court should at least strike the specific allegations of protected litigation activity. Noting the split of authority that existed at that time regarding how the anti-SLAPP statute applied to a mixed cause of action, Defendants argued that the SAC did not allege any such mixed causes of action because their "[l]itigation activity is the only possible pled event that caused [Shops's] transaction to fail while it was still viable." They further argued that even if Shops could show a probability of prevailing on claims based on unprotected activity, the better reasoned cases held that allegations of protected conduct must nevertheless be stricken. Defendants asserted that their protected conduct was not merely incidental to Shops's claims but, rather, was alleged as an independent basis for their liability.

Shops opposed Defendants' anti-SLAPP motion, arguing, *inter alia*, that its claims did not arise from Aimco's lawsuit because the lawsuit had not, in fact, impaired or delayed the close of the Baroudis' ROFR escrow, and that its claims also did not arise from the letter from Aimco's attorney to CTC. Shops also argued that under the *Mann* line of cases, when mixed causes of action are alleged, an anti-SLAPP motion must be denied if a plaintiff shows minimal merit in any part of that cause of action. Shops maintained that Defendants' motion must therefore be denied because Shops's allegations

and evidence showed that Defendants' unprotected conduct was a substantial factor in causing its harm.

In reply, Defendants argued, inter alia, that Aimco's lawsuit and its attorney's letter to CTC were not merely incidental to Shops's claims and that Aimco's execution of the Contribution Agreement and ultimate acquisitions of the ownership interests of the Heimbürges and the Baroudis in LJCM and UBS were not tortious. Defendants argued that Shops's entire case should be dismissed because it was based on Aimco's litigation activities that are protected by the anti-SLAPP statute.

The trial court denied Defendants' anti-SLAPP motion in its entirety. In so doing, the court addressed both steps of the test for anti-SLAPP motions. With respect to the first step, the court concluded that Aimco's lawsuit and its attorney's letter to CTC were acts protected by the litigation privilege and, thus, by section 425.16. However, the court proceeded to conclude that Shops's claims did not arise from that protected activity, stating:

" '[W]here a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct.' (*Mann v. Quality Old Time Service, Inc.*[, *supra*,] 120 Cal.App.4th 90, [103.]) The mere fact an action was filed after protected activity took place does not mean it arose from that activity. The court must focus on the substance of the lawsuit to determine whether it arose from the defendant's protected activities. It is 'the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-[SLAPP] statute applies.' (*Scott v. Metabolife International, Inc.*[, *supra*,] 115 Cal.App.4th 404, [414], citing *City of Cotati v. Cashman*[, *supra*,] 29 Cal.4th 69.) In this case, based upon a review of [Shops's] [SAC] and for the purposes of this motion, the court finds that [Shops's] claims do not arise from Defendant[s'] protected activity. While those two actions both



contributed to interfere with the closing of escrow on September 30, 2014, those were just two acts among many which Defendants allegedly engaged in to undermine the deal between [Shops] and [the Baroudis]. The principal thrust of the case is based upon a lengthy timeline of activities by which Defendants conspired to interfere with [Shops's] contract. Since those acts are simply two limited acts within the entire history preceding the filing of [Shops's] instant action, the court finds that the case does not arise out of Defendants' protected activities."<sup>9</sup>

The trial court went on to address the second step of the anti-SLAPP analysis, stating that even if it were to conclude that Defendants had established that Shops's claims arose from protected activity, the court would deny the Defendants' anti-SLAPP motion because Shops had established a probability of prevailing on the merits. Specifically, the court stated:

"With regard to [the SAC's] interference claims, [Shops] alleges the 'Contribution Agreement' was negotiated and executed in conscious disregard for the exclusivity rights in the ROFR escrow contract and was integral to Defendants' interference scheme. In this case, [Shops] has presented prima facie evidence that Defendants interfered with [Shops's] contractual rights by having the Heimburgs sign the Contribution Agreement which conflicted with [the Baroudis'] right of first refusal. [Citation.] This interference arose because the Contribution Agreement presumed that if [the Baroudis] did not close on September 30, 2014, [they] waived [their] ROFR, despite general law which holds that absent a time is of the essence clause, reasonable time is permitted to close escrow. [Citation.] In addition, [the Baroudis stated they were] willing to

---

<sup>9</sup> To the extent that the trial court considered allegations of both protected and unprotected conduct together in deciding whether a cause of action (or "case") arose out of the protected conduct, in reliance on the *Mann* quotation, this would be error under *Baral*. As *Baral* states, "[a]t the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute [i.e., section 425.16], the second step is reached." (*Baral, supra*, 1 Cal.5th at p. 396.)

close the Heimburge deal after September 30, 2014[, ] but the Heimburses refused. [Citation.] If [the Baroudis] had been able to close the Heimburge deal, [they] still would have been able to complete the deal between [them] and [Shops]. Instead, Aimco and the Heimburses closed on October 31, 2014, and then Aimco proceeded to buy out [the Baroudis] instead of honoring [their] ROFR and allowing [them] to close. Thus, based upon the evidence presented, [Shops] has made a minimal showing of merit and the motion is denied."

Accordingly, the trial court denied Defendants' anti-SLAPP motion in its entirety.

## *2. Anti-SLAPP analysis in this case*

Based on our independent review of the record, we conclude that Defendants did not carry their initial burden to show that any of Shops's claims for relief arose out of Defendants' alleged protected activity. Rather, the SAC's allegations of protected conduct are incidental to, or provide context for, Shops's claims for relief that arise solely out of Defendants' unprotected conduct. The trial court therefore properly denied Defendants' anti-SLAPP motion.

At the time the trial court decided Defendants' anti-SLAPP motion, it did not have the benefit of *Baral*'s recent clarification of the required showings and findings at each step of the analysis in determining anti-SLAPP motions. The SAC alleged nine causes of action, including claims for intentional interference with contract, intentional interference with prospective economic relations, negligent interference with prospective relations, UBP, and declaratory relief. The SAC asserted that certain conduct on the part of Defendants, including the execution of the Contribution Agreement and Aimco's ultimate purchases of the Heimburses' and the Baroudis' LJCM and UBS ownership interests, wrongfully interfered with Shops's rights. The SAC also contained allegations that

Aimco filed its September 2014 lawsuit and that its attorney sent a letter to CTC on September 30.

The SAC expressly set forth the grounds for its claims for relief in paragraph 62, quoted above, stating, inter alia, that Shops's "claim is that Defendants wrongfully interfered with [the Baroudis'] ROFR, the [letter of intent], later assigned to [Shops], and with [Shops's] contract with [the Baroudis], to obtain a property worth in excess of \$60 million; . . . Defendants' actionable misconduct culminated in Aimco's wrongful acquisition of the first 50% on October 31 (the Heimburgs' interest) and the second 50% on December 16 (the Baroudis' interest). As a result, Aimco now possesses the Property that rightfully belongs to [Shops]." <sup>10</sup>

In paragraph 63, the SAC specified Defendants' alleged acts of interference supporting Shops's claims for relief. The acts described did not include any reference to Aimco's lawsuit or its attorney's letter to CTC and, instead, expressly described the Contribution Agreement, Aimco's ultimate purchases of the Heimburgs' and the

---

<sup>10</sup> Paragraph 62 of the SAC includes allegations that constitute conclusions of law, including allegations that "[t]he gravamen of [Shops's] claim is that Defendants wrongfully interfered with [the Baroudis'] ROFR, the [letter of intent], . . . and with [Shops's] contract with [the Baroudis] . . . ; [Shops's] claim does not arise from Defendants' purportedly privileged conduct which, to the extent it exists, was merely incidental to Defendants' months-long campaign of interference. . . ." We do not rely on, or give effect to, conclusions of law asserted in complaints. (*Green v. Palmer* (1860) 15 Cal. 411, 414 [legal inferences or conclusions should not be stated in a complaint because they are the province of the court]; cf. *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865 [on appeal from a judgment dismissing an action after order sustaining a demurrer, court does not assume the truth of conclusions of law alleged in the complaint].) Accordingly, in disposing of this appeal, we do not rely on any conclusions of law asserted in the SAC and, in particular, we do not rely on the above asserted conclusions of law.

Baroudis' LJCM and UBS ownership interests, and other conduct on the part of Defendants. None of the SAC's nine causes of action specifically referred to Aimco's lawsuit or its attorney's letter to CTC or specifically alleged that either of those acts, or any delay that may have been caused by those acts, was a basis for the relief requested.

Although the SAC alleged in its general allegations activity by Defendants that is protected under the anti-SLAPP statute (i.e., Aimco's lawsuit and its attorney's letter to CTC), the SAC did not base any of its claims for relief on Aimco's lawsuit or its attorney's letter to CTC.

Parsing out the SAC's allegations of protected activity, we conclude that Shops's claims for relief are not based on allegations of Defendants' protected activity. (*Baral*, *supra*, 1 Cal.5th at p. 396.) Rather, Shops's claims for relief are based on Defendants' unprotected conduct, including the execution of the Contribution Agreement and Aimco's purchases of the Heimburses' and the Baroudis' ownership interests in LJCM and UBS. Defendants argued below, and argue on appeal, that Aimco's lawsuit and its attorney's letter to CTC constituted alleged acts of interference, if not the ultimate acts of interference, under the SAC. However, as noted, the SAC did not allege that either of those protected acts caused Shops's harm. Instead, the SAC alleged that the Baroudis' ROFR rights and Shops's rights under the purchase agreement continued in effect after September 30, 2014, thereby allowing the close of escrows of the transactions based on the Baroudis' and Shops's rights to occur after that date. The SAC alleged claims for relief arising out of Aimco's acquisition, *after* those delays, of the Heimburses' and the Baroudis' LJCM and UBS ownership interests *while Shops still had an enforceable*

*contract to purchase the Baroudis' ownership interests in LJCM and UBS* (and the Baroudis still had enforceable ROFR rights to acquire the Heimbürges' ownership interests in those entities). The SAC alleged that the purchase agreement between Shops and the Baroudis provided for an extension of the escrow closing date up to three months if the Heimbürges resisted the Baroudis' attempt to exercise or enforce their ROFR rights. It further alleged that Shops remained ready, willing, and able to close the purchase after September 30, 2014. Thus, contrary to Defendants' apparent belief as expressed in the Contribution Agreement, Shops contends that Aimco was not free to intervene and interfere with Shops's rights after September 30, 2014, when the escrows did not close.<sup>11</sup>

To the extent that the SAC included allegations of protected activity by Defendants (i.e., Aimco's lawsuit and its attorney's letter to CTC), those allegations were merely incidental or collateral to, and merely provided context for, Shops's claims for relief, which were based on Defendants' unprotected activity as expressly alleged in the SAC. (*Baral, supra*, 1 Cal.5th at p. 394.) The anti-SLAPP statute does not apply to Defendants' alleged protected conduct because that conduct is, at most, evidence supporting Shops's claims for relief and does not constitute the alleged wrongful conduct on which those claims are based. (*Wallace v. McCubbin, supra*, 196 Cal.App.4th at p. 1183; *Gallimore v. State Farm Fire & Casualty Ins. Co., supra*, 102 Cal.App.4th at p. 1399.)

---

<sup>11</sup> As quoted above, the Contribution Agreement stated: "If Krista Baroudi subsequently refuses or fails to close the transactions contemplated by her purported exercise of each ROFR on or before September 30, 2014, such ROFR shall be deemed to have been waived."

Accordingly, Defendants did not carry their initial burden under the first step of the anti-SLAPP analysis to show that Shops's claims for relief under the SAC arose from allegations of their protected activity. (*Baral, supra*, 1 Cal.5th at p. 395; § 425.16, subd. (b)(1).) Because Defendants did not carry their initial burden, we need not, and do not, address whether Shops carried its burden under the second step to show that it had a probability of prevailing on any claims for relief arising out of allegations of Defendants' protected activity. Defendants' anti-SLAPP motion therefore must be denied and none of the SAC's allegations of protected activity need be stricken under the anti-SLAPP statute. Based on our reasoning above, we conclude that the trial court correctly denied Defendants' anti-SLAPP motion.

*D. Nonsection 425.16 contentions*

Defendants also contend that the SAC's three causes of action against the Heimburges for interference torts and its UBP cause of action against Defendants must be stricken based on grounds other than section 425.16. In particular, Defendants contend that the Heimburges cannot be held liable for interference with their own contract or economic relationship. They also argue that the common law torts alleged in the SAC cannot provide a basis for a UBP cause of action. However, none of those arguments were raised in the trial court in Defendants' anti-SLAPP motion. Accordingly, we decline Defendants' request that we address those non-SLAPP contentions in this appeal.

IV.

DISPOSITION

The order is affirmed. Shops shall recover its costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.